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No. 89-1303

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

RESERVE LIFE INSURANCE COMPANY,
Petitioner,

v.

PATRICIA STEPHENSON EICHENSER,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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*DEWITT T. HICKS, JR.
GHOLSON, HICKS & NICHOLS
Post Office Box 1111
Columbus, Mississippi 39703
(601) 327-0662

Attorneys for Respondent

**Counsel of Record*

Of Counsel:

THOMAS L. KESLER
SAMS, KESLER & HUDSON
Post Office Box 249
Columbus, Mississippi 39703

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

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STATEMENT OF THE CASE

This is a case where the Petitioner refused to pay medical expenses incurred as a result of Pelvic Inflammatory Disease that necessitated a hysterectomy. By definition, this condition is sudden in onset. Without consulting the attending physician, or securing all the medical records, or consulting a physician of Petitioner's choice, the claim was repeatedly denied on the basis that there was a pre-existing condition.

After a bench trial, the Trial Judge found the Petitioner had violated its implied covenant of good faith dealing as a result of its repeated claim denial without an arguable basis. Punitive damages of $500,000.00 were awarded. On appeal, after de novo consideration, the Fifth Circuit panel unanimously affirmed. Both en banc and panel re-hearing motions were denied.

THE ARGUMENT
REASONS NOT TO GRANT THE WRIT

A. This is not an appropriate case to consider constitutional questions concerning Mississippi's substantive law of punitive damages.

The facts and circumstances of this case make it an inappropriate case for this Court to entertain constitutional arguments questioning Mississippi's substantive law concerning punitive damages. The facts of this case were determined by the District Court after a bench trial. The District Court carefully deliberated the facts and the resulting judgment. (The District Court opinion is Appendix C to the Petition for Writ of Certiorari.) Finding that Reserve Life had litigated tortious breach of insurance contract issues in Mississippi in the case of *Reserve Life Insurance Company v. McGee*, 444 So.2d 803 (Miss. 1983), the Court of Appeals concluded that such involvement, taken with other relevant facts, precluded a finding of a violation of due process. App. A, p. 23a. *Reserve Life Insurance Company v. McGee*, supra, was announced in 1983, the same year in which the conduct of Reserve giving rise to Eichenser's case of action commenced.

The reasoning of the Court of Appeals is sound. Reserve's prior involvement in a breach of insurance contract case in Mississippi was direct notice of the nature of the independent tort recognized by Mississippi law, and direct notice of the probability of enhanced damages in the event of a repeat offense.

The Mississippi Supreme Court announced the existence of the cause of action for an independent tort committed in the course of a breach of insurance

contract eight years prior to the start of Reserve's egregious conduct toward Eichenser in *Progressive Casualty Insurance Company vs. Keys*, 317 So.2d 396 (1975). Two years later, that Court affirmed a substantial award of punitive damages in *Standard Life Insurance Company v. Veal*, 354 So.2d 239 (Miss. 1977). As discussed below, it can hardly be said that Reserve was without notice and caught unaware of the nature and seriousness of its actions and failure to act in this case. Even if one could believe that Reserve was unaware of Mississippi law in this respect prior to the lawsuit filed by McGee, it was certainly well educated as a result of that litigation.

This is a particularly inappropriate case in which to consider the due process arguments of Reserve with respect to the issue involving notice of prohibited conduct. This case involves specific, narrow issues of tortious breach of insurance contracts. It does not involve elements of fraud or the various intentional torts or civil rights violations for which punitive damages have traditionally been awarded. This case lacks appropriate parties, subject matter and factual basis for this Court to fashion any rule determining in what manner the Due Process Clause checks the award of punitive damages in any given case.

There are no facts to support the argument of Reserve that it was exposed to a retrospectively applied standard of conduct. The arguments of Reserve are primarily based upon the Mississippi Supreme Court's decision in *Bankers Life and Casualty v. Crenshaw*, 483 So.2d 254 (Miss. 1985), which was decided within a few weeks prior to this litigation being filed. It is the contention of Reserve that this case imposed new, enhanced duties to investigate claims on insurance

companies. This contention is erroneous because the Mississippi Supreme Court simply explained that a minimal investigation into a health insurance claim would include obtaining all relevant medical records and interviews of the treating physician. The case does not depart from the initial rule found in the seminal cases cited above. The decision states that Banker's Life knew what a minimal investigation included, but failed to conduct such an investigation. However, even if one could believe that Reserve stood ignorant of how to conduct a minimal investigation prior to the *Bankers Life* decision in 1985, the company was certainly aware of what constituted adequate investigation after the fact. Nevertheless, Reserve waited two more years, until shortly before trial, to conduct any further investigation into Eichenser's claim, and then only to secure expert testimony for the trial.

Yet another facet of this case which renders it inappropriate for this Court's review is that the arguments advanced by Reserve, and other insurance companies, are largely directed at huge verdicts returned by juries, rather than judges acting as triers-of-fact. Juries, Reserve argues, are the villains "playing Robin Hood" by returning multi-million dollar verdicts. In this case, however, the judgment was returned by the District Court sitting without a jury, only after careful consideration of the record. The District Court was certainly not arbitrary nor capricious in reaching its decision, taking almost seven months to deliberate this case. It is outrageous to suggest or even imply that Judge Senter played "Robin Hood" in this case.

Finally, the amount of the award in this case is rather modest in comparison to the punitive damage awards cited by Reserve in the Petition for Writ of Certiorari. It certainly appears that various defendants identified by Reserve will probably ask this Court to consider in what manner the Due Process Clause checks punitive damages in cases with proper factual foundations and awards in such huge amounts as to demonstrate a crippling effect on an individual defendant.

Furthermore, the award of $500,000.00 is this case amounts to less than one-third of one percent (0.333%) of Reserve's admitted net worth of approximately $157,000,000.00. Payment of the award in this case can pose no long term hardship on Reserve; yet it will not soon be forgotten as was the case of *Reserve Life Insurance Company v. McGee*, supra. Deterrence, one of the primary objectives of the District Court in making this award, will be accomplished and justice will be served. This fact diminishes Reserve's arguments that this case is of such import as to necessitate review by this Court on the constitutional or any other grounds.

B. Mississippi's substantive law affords due process protection to insurance companies.

It must be recognized that insurance companies have an affirmative duty to be cognizant of the law of the states in which they sell coverage. *Richards v. Allstate Insurance Company*, 693 F.2d 502, at 505 (5th Cir. 1982). It has already been noted that Mississippi's Supreme Court recognized a cause of action for tortious breach of an insurance policy in 1975. *Progressive Casualty Insurance Company v. Keys*, 317 So.2d 396 (Miss. 1975). That court applied the prin-

ciple in *Standard Life Insurance Company v. Veal*, 354 So.2d 239 (Miss. 1977), stating that the company arbitrarily denied a legitimate claim of $1,008.00 for no reason whatever, wholly without any legitimate or arguable reason therefor. That court further found that a $25,000.00 punitive damage award, considered in light of the assets of the defendant insurance company in excess of $85,000,000.00, was necessary to deter the arbitrary action of the company. Thus, insurance companies were thereafter on notice that the failure to pay claims, absent some legitimate or even arguable reason would constitute an independent tort for which substantial awards of punitive damages would be appropriate. In order for an insurance company to have a legitimate or arguable reason, simple logic dictates that the insurance company evaluate and investigate a claim before denial.

It is important to note that the Mississippi Supreme Court characterized the conduct of Standard Life as an arbitrary act. Thus, insurance companies, including Reserve Life, were on notice in 1977 that claims must not be rejected in an arbitrary manner. "Arbitrary" is defined in Black's Law Dictionary 4th Ed. Rev. (1976) as follows:

> . . .as fixed or done capriciously or at pleasure; without adequate determining principle; not founded in the nature of things; nonrational; not done or acting according to reason or judgment. . . [citations omitted]

It is clear that Mississippi's substantive law rule on tortious breach of insurance contracts was stated with sufficient precision to meet due process requirements as early as 1977.

Subsequent decisions of the Mississippi Supreme Court equate arbitrary handling of insurance claims with intentional wrong, gross negligence, and reckless disregard for the rights of the insured. See: *Weems v. American Security Insurance Company*, 486 So.2d 1222 (Miss. 1986). There is precedent from this Court contrary to the position of Reserve. In finding punitive damages allowable in civil rights cases, this Court state in *Smith v. Wade*, 461 U.S. 30, 103 S.Ct. 1625, 75 L.Ed.2d 632 (1983):

> . . .deterrence, he contends, cannot be achieved unless the standard of conduct sought to be deterred is stated with sufficient clarity to enable potential defendants to conform to the law and to avoid the proposed sanction. Recklessness or callous indifference, he argues, is too uncertain a standard to achieve deterrence rationally and fairly. A prison guard, for example, can be expected to know whether he is acting with actual ill will or intent to injure, but not whether he is being reckless or callously indifferent. Smith's argument, if valid, would apply to ordinary tort cases as easily as to § 1983 suits. . .In any event, the argument is unpersuasive. . .103 S.Ct, at 1636, 1637.

For guidelines in determining the amount to be inflicted in punitive damage suits against insurance companies, the Mississippi Supreme Court looked to traditional Mississippi substantive law rules concerning such punitive damages. *Standard Life Insurance Company v. Veal*, supra, citing *Snowden v. Osborne*, 269 So.2d 858 (Miss. 1972), and *Yazoo & Mississippi Valley Railroad v. W[illegible]* 57 Miss. 344, 39 So.

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489 (1905). Although Mississippi law highly respects the jury's mature discretion in setting punitive damages, *Snowden v. Osborne*, supra, there are due process satisfying limits as to the amount of punitive damages juries or fact-finders are allowed to inflict. Mississippi law has never contemplated allowing juries unfettered discretion in awarding punitive damages. *Gulf M. & O. R. Co. v. Hawthorne*, 225 Miss. 1, 82 So.2d 454 (1955), states that a jury must not be set "loose without a bridle" in the area of punitive damages. Arbitrary and unreasonable amounts are forbidden. *Commodore Corporation v. Bailey*, 393 So.2d 467 (Miss. 1981). The amount should punish a defendant, but is not allowed to financially destroy a defendant. *T.C.L., Inc. v. Lacoste*, 431 So.2d 918 (Miss. 1983). Thus, proof of the financial condition of the defendant is a prerequisite of any punitive damage award so as to provide the necessary yardstick as to amount. *First American Bank of Iuka v. Mitchell*, 359 So.2d 1376 (Miss. 1978). The Court of Appeals noted that the factors to be followed in determining the amount is summarized in *Bankers Life and Casualty v. Crenshaw*, supra, at 278, as:

> (1) Such amount as is necessary for the punishment of the wrongdoing of the defendant and deterring defendant from similar conduct in the future;
>
> (2) Such amount as is reasonably necessary to make an example of the defendant so that others may be deterred from the commission of similar offenses; and
>
> (3) The pecuniary ability or financial worth of the defendant.

Furthermore, Mississippi law requires its judges to make very restrictive decisions of fact and law prior to allowing a jury to consider punitive damages against an insurance company. *Blue Cross and Blue Shield v. Campbell*, 466 So.2d 833 (Miss. 1984). Such decisions are reviewed by appellate courts de novo. *Reserve Life Insurance Company v. McGee*, supra. Section 11-1-55, Mississippi Code of 1972, grants Mississippi's courts the power to make remittitur of excessive punitive damage awards.

Mississippi's substantive law concerning punitive damages as applied to insurance companies meets constitutional due process requirements.

C. Mississippi's substantive law on tortious breach of insurance contracts does not violate the Contract Clause.

Reserve erroneously urges that this Court should consider "retrospectively applied standards of conduct". As demonstrated above, the Mississippi Supreme Court clearly articulated the relevant standards of conduct in 1977 with its decision in *Standard Life Insurance Company v. Veal*, supra. There have been no enhanced standards of conduct espoused by the Mississippi Supreme Court. Subsequent decisions from that court simply apply the rules in the infinite factual situations that can arise in litigation of this type. It could be argued that if any revisions to the seminal rule in Mississippi have occurred, the revisions have made the possibility of punitive damage awards against insurance companies for tortious breach of contract more remote. In any event, Reserve is attempting to disguise what is in reality an ex post facto challenge to Mississippi's judically created law as a due process challenge. The challenge

is without merit as a due process argument as demonstrated previously in this brief. Viewed as an ex post facto argument, it must also fail. Although Art. I, § 10 of the Constitution prohibits ex post facto laws, it does not, by its own terms, apply to judicial decisions. *Jordan v. Watkins*, 681 F.2d 1067 (5th Cir. 1982).

With respect to the Contract Clause arguments advanced by Reserve, we find again that Art. I, § 10 of the Constitution limits its application to actions of the legislative authority, not the judiciary. *Frazier v. Lowndes County, Mississippi*, 710 F.2d 1097 (5th Cir. 1983). Any other interpretation of our Constitution would be a radical departure from past precedent, and is not necessary in this case because the facts do not support a finding of any retrospective impairment of Reserve's contract.

CONCLUSION

Reserve Life has failed to set forth sufficient reasons why this Court should devote precious attention to a case in which the facts and record will not support arguments of constitutional magnitude. There is no evidence that the existing judgment for punitive damages inflicted upon Reserve Life was the result of any arbitrary or capricious action of the District Court, or any constitutional infirmity of Mississippi's substantive law.

There is no reason for this Court to suddenly change its direction, evidenced by the recent treatment of cases attempting to pose similar arguments and issues, at this time. This Court should deny the Petition for Writ of Certiorari summarily.

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Respectfully Submitted,

*DEWITT T. HICKS, JR.
GHOLSON, HICKS & NICHOLS
Post Office Box 1111
Columbus, Mississippi 39703
(601) 327-0662

Attorneys for Respondent

**Counsel of Record*

Of Counsel:

THOMAS L. KESLER
SAMS, KESLER & HUDSON
Post Office Box 249
Columbus, Mississippi 39703